

U.S. DISTRICT COURT
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U.S. DISTRICT COURT, N.D. ALA.

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1976

No. **76-535**

Guy H. Jones and Elizabeth Jones *Petitioners*

v.

United States of America *Respondent*

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
AND APPENDICES**

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GUY JONES, JR.**

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No.

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v.

United States of America *Respondent*

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
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AND APPENDICES

The Petitioners Guy Hamilton Jones and Elizabeth Jones respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding July 21, 1976.

OPINION BELOW

The opinion of the Court of Appeals, reported as
____ F 2d ____ appears in the Appendix hereto. The

opinion of the District Court for the Eastern District of Arkansas is reported as _____ F. Supp. _____ (E.D. Ark. 1976) and appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was rendered July 21, 1976. This Petition for Writ of Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

1. May taxpayers appearing in obedience to I.R.S. summons issued pursuant to 26 U.S.C. §7602 be compelled to respond to questions and compelled to open their records in their possession after they interpose Fourth and Fifth Amendment privileges?

STATEMENT OF THE CASE

Petitioners, with their attorneys, appeared before an agent for the Internal Revenue Service at 9 a.m. on September 24, 1975 in obedience to an administrative summons issued pursuant to 26 U.S.C. §7602. They had with them the items specified in the summons concerning their bank and tax records for the calendar year 1972.

Petitioners orally and in writing asserted Fourth and Fifth Amendment privileges and refused to respond to questions and refused access to bank and tax records in their possession. Petitioners then departed taking with them the records in their possession.

On January 7, 1976, the District Court for the Eastern District of Arkansas issued an order directing Petitioners to appear at 9:30 a.m., January 29, 1976 and show cause why they should not be compelled to obey the summons issued by the IRS agent.

Petitioners appeared in the District Court pursuant to the show cause order and presented arguments raised by their response to respondent's application for an order requiring obedience to the IRS summons. They urged in the District Court that they had obeyed the summons by appearing in person and with counsel, bringing with them records in their possession for the calendar year 1972 as commanded by the summons. They argued that they should not be compelled to testify or to open records in their

possession after asserting Fourth and Fifth Amendment privileges.

On January 30, 1976 the District Court made and entered its order compelling petitioners to appear before the IRS agent and to answer questions and to open records in their possession as specified in the IRS summons.

Petitioners timely appealed to the Circuit Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the District Court order on July 21, 1976 and fixed guidelines compelling Petitioners to appear in obedience to the summons and compelling Petitioners to answer all unobjectionable questions and compelling specific objections to questions or to specific demands for the submission of particular documents. Any claim of privilege, the Appeals Court said, could be reviewed in the District Court.

Petitioners will urge here, as they did below, that the Fourth and Fifth Amendment privileges are such delicate flowers that the slightest breath of waiver will penetrate the protective shield against compulsion. Petitioners will urge that the guidelines promulgated by the Appeals Court clash head on with the decision of this Court in *Garner v. United States*, ____ U.S.____, 47 L. Ed. 2d 370, 96 S. Ct._____. (Decided March 23, 1976.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE CLEAR GUIDELINES OF THIS COURT IN *GARNER V. UNITED STATES*.

Petitioners argued to no avail below that their Fourth and Fifth Amendment rights and privileges bar compulsory compliance with an administrative summons issued by agents of the Internal Revenue Service pursuant to 26 U.S.C. §7602. They urge here a like argument in asking this Court to make it abundantly clear that no judicial, quasi-judicial or administrative proceeding can supersede or subordinate rights and privileges contained in our Constitution.

It would appear that this Court has already so declared the substantive law of this land in *Garner v. United States*, ____ U.S._____, 47 L.Ed.2d 370, 96 S.Ct._____, (Decided March 23, 1976). There this Court said:

"Unless a witness objects a government ordinarily may assume that its compulsory processes are not eliciting testimony that he deems to be incriminating. Only the witness knows whether the apparently innocent disclosure sought may incriminate him, and the burden appropriately lies with him to make a timely assertion of the privilege."

That is what this case is all about. A claim of the privilege under the Fourth and Fifth Amendments has been asserted each step of the way to this Court. There

is no hint of waiver. To the contrary, there is the ever present claim of the privilege.

In the instant case, Internal Revenue Service Agents seek to compel Petitioners to surrender records belonging to them and in their possession and further seek to compel Petitioners to appear and testify, all in the teeth of a repeated claim of privilege under the Fourth and Fifth Amendments.

The Court in *Garner, supra*, stated:

"We start from the fundamental proposition that

'a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant. *Kastigar v. United States*, 406 U.S. 441, 32 L.Ed.2d 212, 92 S.Ct. 1653 (1972). Absent such protection, if he is nevertheless compelled to answer, his answers are inadmissible against him in a later criminal prosecution (Citing cases.)' "

"The Court has held that an individual under compulsion to make disclosures as a witness who revealed information instead of claiming the privilege lost the benefit of the privilege. *United States v. Kordel*, 397 U.S. 1, 7-10, 25 L.Ed. 2d 1, 90 S.Ct. 763 (1970). Although Kordel appears to be the only square holding to this effect, the Court frequently has recognized the principle in dictum. (Citing cases)."

In footnote 6 the Supreme Court commented in *Garner, supra*:

"18 USC §6004 [18USCS §6004] would appear to authorize the Service, as an alternative to an enforcement suit, to order a summoned taxpayer to make disclosures in exchange for immunity. We are informed, however, that it has not been the Service's practice to utilize §6004. Brief for United States, at 19."

2. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS.

Compelling Petitioners to testify and to open their private books and papers is clearly repugnant to both the Fourth Amendment and Fifth Amendment. The decision of the Eighth Circuit is clearly contrary to the rationale of this Court in *Garner v. United States, supra*, and with decisions of other courts of appeal.

The Seventh Circuit has spoken directly in support of the position taken by Petitioners in *Hill v. Philpott*, 445 F. 2d 144 (1971). It was there said:

"In numerous cases where the Internal Revenue Service has sought court enforcement of its summons pursuant to statute (26 U.S.C. §7402), courts have held that a taxpayer may refuse production of personal books and records by assertion of his privilege against self-incrimination. See, e.g. *Stuart v. United States*, 416 F.2d 459 (5th Cir. 1967); *United*

States v. Cohen, 388 F.2d 469 (9th Cir. 1967); *United States v. Kleckner*, 273 F. Supp. 251 (S.D. Ohio 1967) App. Dism. 382 F. 2d 1022 (6th Cir. 1967)."

As late as December 5, 1975 the Fourth Circuit addressed a situation not unlike that presented here. In *Shaffer v. United States*, 20 Fed. Rules Serv. 2d 1428; ____ F.2d____, the Court there said:

"If the Government wishes to depose the taxpayer, it should obtain use immunity for him as to any criminal proceedings other than one relating to perjury. If the taxpayer refuses to testify after having obtained immunity, the district court may grant appropriate relief pursuant to Rule 37, including dismissal of the taxpayer's suit and entry of judgment for the United States on its counterclaim. In any event, the district court should stay further proceedings until the Government has obtained immunity for the taxpayer or until all applicable statutes of limitations have run."

Petitioners have consistently and persistently demanded of the IRS precisely what it was IRS wanted to know and for what purposes IRS intended to use the information sought. Petitioners' persistence was met with stony silence in the beginning and then with the summons commanding Petitioners to appear with their papers.

Petitioners obeyed the summons. They appeared in person with the records commanded in the summons. They then again announced their claim of privilege

under the Fourth and Fifth Amendments and politely took their leave. The government then sought to compel Petitioners to testify and to open their papers to the IRS and obtained an order of the District Court to that effect. That order was affirmed on appeal to the Eighth Circuit. Petitioners now ask this Court to interpose the protective shield of the Fourth and Fifth Amendments between them and the compulsion sought by the government.

CONCLUSION

For the reasons herein urged, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Counsel for Petitioners

APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 76-1133

United States of America,	*
	*
Appellee,	*
	*
v.	*
	* Appeal from the United
	* States District Court
	* for the Eastern District
	* of Arkansas.
	*
Appellants.	*

Submitted: July 7, 1976

Filed: July 21, 1976

Before BRIGHT, STEPHENSON and HENLEY, Circuit Judges.

PER CURIAM.

Guy H. Jones of Faulkner County, Arkansas, and Elizabeth Jones, his wife, appeal from an order of the

United States District Court for the Eastern District of Arkansas ¹ enforcing a summons issued by an officer of the federal Internal Revenue Service.

The summons required Mr. and Mrs. Jones to appear before an officer of the Service and to testify with respect to their income tax liability for the calendar year 1972; they were also directed to produce certain documentary material.

Appellants obeyed the summons to the extent that they appeared before the Internal Revenue Agent who had issued the summons. At that time they announced both orally and by letter that they intended to rely upon their "constitutional rights and privileges." They then took their departure. At no time did the Agent ask appellants any questions or call upon them to deliver any of the documents that they had brought with them.

Thereafter the government acting pursuant to 26 U.S.C. §7604 filed an application in the district court for an order enforcing the summons. That court issued a show cause order to which appellants responded. The district court ordered that the summons be enforced. This appeal followed.

It is well settled that a person who has been summoned to appear before an Internal Revenue Agent

as provided by 26 U.S.C. §7602 may not on the basis of a general objection or claim of constitutional privilege refuse to submit to questioning by the Agent. The proper course for the individual concerned to pursue is to appear in obedience to the summons, answer all unobjectionable questions, and make specific objections to specific questions or to specific demands for the submission of particular documents. If that is done, proper review of any claims of privilege can be had in the district court. *See Russell v. United States*, 524 F.2d 1152 (8th Cir. 1975); *United States v. Theep*, 502 F.2d 797 (9th Cir. 1974); *United States v. Awerkamp*, 497 F.2d 832 (7th Cir. 1974); *United States v. Malnik*, 489 F.2d 682 (5th Cir. 1974); *United States v. Held*, 435 F.2d 1361 (6th Cir. 1970).

Accordingly, we affirm the order of the district court. When appellants appear before the Agent again, they may protect their constitutional rights in the manner above indicated.

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

1.

The Honorable Terry L. Shell, United States District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF ARKANSAS,
WESTERN DIVISION

UNITED STATES OF AMERICA

v.

NO. LR-76-M-164

GUY H. JONES AND ELIZABETH JONES

ORDER

(Filed January 30, 1976)

Now on this 29th day of January, 1976, comes on to be heard the "Application for Order Requiring Obedience to Summons" filed herein by the Petitioner, the United States of America, against the Respondents, Guy H. Jones and Elizabeth Jones, and based upon said application, the response thereto filed herein in behalf of the Respondents, the testimony received on this date, and the arguments of counsel, the court hereby finds as follows:

1. That, on the 13th day of February, 1975, the Respondents were first contacted by Clark Morgan, Revenue Agent with the Internal Revenue Service, concerning an audit of said Respondents' 1972 income tax return;

2. That, thereafter, and until the 9th day of September, 1975, an extended procedure ensued, through which procedure said Clark Morgan repeatedly attempted to interview said Respondents and to gain access to certain designated tax records;

3. That on the 9th day of September, 1975, after a total failure of the procedure noted in Paragraph No. 2, above, summonses were issued (one for each Respondent) and served pursuant to Sections 7602 and 7603, Title 26, of the United States Code, and that said summonses established the 24th day of September, 1975, as the date for appearance, required the testimony of both Respondents, and required the production of documents, which documents are more fully described in Paragraphs No. (b) and (c), below;

4. That on the 24th day of September, 1975, the Respondents did appear and did purportedly bring with them such documents as were sought by the summonses; however, no testimony was given and the Revenue Agent was not permitted to examine said documents;

NOW THEREFORE, IT IS HEREBY ORDERED, DECREED AND ADJUDGED that:

(a) On the 23rd day of February, 1976, at 9:00 a.m. in the Federal Office Building, 700 West Capitol, Room 2210, Little Rock, Arkansas, Respondent Guy H. Jones appear before Clark Morgan, an officer of the Internal Revenue Service, for the purpose of giving testimony relating to his tax liability, or the collection of

his tax liability, for the tax year ending on the 31st day of December, 1972;

(b) Respondent Guy H. Jones, at the time and place indicated in Paragraph No. (a), above, bring with him, and produce for examination, the following books, records, and papers:

1. All bank statements, cancelled checks, and deposit slips in your possession or control which reflect transactions in your checking accounts for the calendar year 1972.
2. Transcripts of all savings accounts, reflecting all deposits and withdrawals for the calendar year 1972.
3. The general ledger and journal or any other records which reflect all the transactions of the legal practice of Guy H. Jones for the calendar year 1972.
4. The general ledger and journal or any other records which reflect all the transactions concerning rental income and expenses for the calendar year 1972.

(c) Respondent Elizabeth Jones permit Respondent Guy H. Jones to bring with him, at the time and place indicated in Paragraph No. (a), above, and that Guy H. Jones do so, the following books, records, and papers pertaining to the financial transactions of said Elizabeth Jones:

1. All bank statements, cancelled checks, and deposit slips in your possession or control which reflect transactions in your checking accounts for the calendar year 1972.
2. Transcripts of all saving accounts, reflecting all deposits and withdrawals for the calendar year 1972.
3. The general ledger and journal or any other records which reflect all the transactions of Jones Beauty Salon for calendar year 1972.
4. The general ledger and journal or any other records which reflect all the transactions concerning rental income and expenses for the calendar year 1972.

(d) The time for appearance designated in Paragraph No. (a), above, may be extended for a reasonable length of time if such an extension is necessary for a thorough examination, and the Respondents may bring with them at such appearance or appearances any person or persons reasonably connected with the preparation or maintenance of tax records subject to this order, and any person designated by the Respondents as their attorney.

/s/ Terry L. Shell
UNITED STATES DISTRICT JUDGE